

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MAX N. CRANLEY,

Plaintiff,

V.

CAROLYN W. COLVIN, Commissioner of  
Social Security,

**Defendant.**

Case No. 3:14-cv-05145 KLS

## ORDER AFFIRMING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his

application for supplemental security income (“SSI”) benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties’ briefs and the remaining record, the Court hereby finds that for the reasons set forth below, defendant’s decision to deny benefits should be affirmed.

## FACTUAL AND PROCEDURAL HISTORY

On March 7, 2011, plaintiff filed an application for SSI benefits, alleging disability as of May 1, 1996, due to Tourette's syndrome, anxiety, and depression. See Administrative Record (“AR”) 17, 159-65. The application was denied upon initial administrative review and on reconsideration. See AR 106-09, 116-19. A hearing was held before an administrative law judge (“ALJ”) on March 20, 2012, at which plaintiff, represented by counsel, appeared and testified, as did vocational expert Susan Stewart. See AR 32-70.

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1 On March 27, 2012, the ALJ issued a decision in which plaintiff was determined to be  
2 not disabled. See AR 14-31. Plaintiff's request for review of the ALJ's decision was denied by  
3 the Appeals Council on December 20, 2013, making the ALJ's decision defendant's final  
4 decision. See AR 1-4; see also 20 C.F.R. § 404.981, § 416.1481. On February 25, 2014, plaintiff  
5 filed a complaint in this Court seeking judicial review of the ALJ's decision. See Dkt. #3. The  
6 administrative record was filed with the Court on April 29, 2014. See Dkt. #10. The parties have  
7 completed their briefing, and thus this matter is now ripe for judicial review and a decision by  
8 the Court.

9 Plaintiff argues the ALJ's decision should be reversed and remanded to defendant for  
10 payment of benefits or, in the alternative, further administrative proceedings, because the ALJ  
11 erred: (1) in determining plaintiff's severe impairments at step two; (2) in failing to find plaintiff  
12 met listing 12.04 and 12.06; (3) in assessing plaintiff's residual functional capacity; and (4) in  
13 finding plaintiff to be capable of performing other jobs existing in significant numbers in the  
14 national economy. For the reasons set forth below, the Court disagrees that the ALJ erred in  
15 determining plaintiff to be not disabled, and therefore finds that defendant's decision should be  
16 affirmed.

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19 DISCUSSION

20 The determination of the Commissioner of Social Security (the "Commissioner") that a  
21 claimant is not disabled must be upheld by the Court, if the "proper legal standards" have been  
22 applied by the Commissioner, and the "substantial evidence in the record as a whole supports"  
23 that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v.  
24 Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan,  
25 772 F.Supp. 522, 525 (E.D. Wash. 1991) ("A decision supported by substantial evidence will,

1 nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence  
 2 and making the decision.”) (citing Brawner v. Secretary of Health and Human Services, 839 F.2d  
 3 432, 433 (9th Cir. 1987)).

4 Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
 5 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation  
 6 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if  
 7 supported by inferences reasonably drawn from the record.”). “The substantial evidence test  
 8 requires that the reviewing court determine” whether the Commissioner’s decision is “supported  
 9 by more than a scintilla of evidence, although less than a preponderance of the evidence is  
 10 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence  
 11 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.  
 12 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence  
 13 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting  
 14 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

15 I. The ALJ’s Step Two Determination

16 Defendant employs a five-step “sequential evaluation process” to determine whether a  
 17 claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found  
 18 disabled or not disabled at any particular step thereof, the disability determination is made at that  
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 26<sup>1</sup> As the Ninth Circuit has further explained:

27 . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
 28 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by  
 29 substantial evidence, the courts are required to accept them. It is the function of the  
 30 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may  
 31 not try the case de novo, neither may it abdicate its traditional function of review. It must  
 32 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are  
 33 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

1 step, and the sequential evaluation process ends. See id. At step two of the evaluation process,  
 2 the ALJ must determine if an impairment is “severe.” 20 C.F.R. § 404.1520, § 416.920. An  
 3 impairment is “not severe” if it does not “significantly limit” a claimant’s mental or physical  
 4 abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c);  
 5 see also Social Security Ruling (“SSR”) 96-3p, 1996 WL 374181 \*1. Basic work activities are  
 6 those “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1521(b), § 416.921(b);  
 7 SSR 85- 28, 1985 WL 56856 \*3.  
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9 An impairment is not severe only if the evidence establishes a slight abnormality that has  
 10 “no more than a minimal effect on an individual[’]s ability to work.” SSR 85-28, 1985 WL  
 11 56856 \*3; see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841  
 12 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that his “impairments or their  
 13 symptoms affect [his] ability to perform basic work activities.” Edlund v. Massanari, 253 F.3d  
 14 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). The step  
 15 two inquiry described above, however, is a *de minimis* screening device used to dispose of  
 16 groundless claims. See Smolen, 80 F.3d at 1290.  
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18 Plaintiff argues the ALJ erred by failing to find depression to be a severe impairment at  
 19 step two. Dkt. #12, p. 5-6. This Court disagrees. “[T]he existence of a medically determinable  
 20 physical or mental impairment must be established by medical evidence.” Ukolov v. Barnhart,  
 21 420 F.3d 1002, 1005 (9th Cir. 2005) (quoting SSR 96-4p, 1996 WL 374187 \*1). Further, “[a]  
 22 ‘symptom’ is not a ‘medically determinable physical or mental impairment’ and no symptom by  
 23 itself can establish the existence of such an impairment.” SSR 96-4p, 1996 WL 374187 \*1.  
 24 Plaintiff pointed to no diagnosis or objective evidence of a depressive disorder. Plaintiff merely  
 25 cited to reports of plaintiff’s symptoms in the record, which he argues are consistent with  
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1 depressive disorder. See Dkt. #12, pp. 5-6. However, these symptoms alone are insufficient to  
 2 show a medically determinable impairment. See SSR 96-4p, 1996 WL 374187 \*1. Plaintiff  
 3 failed to show the ALJ erred in failing to find depressive disorder severe at step two.

4        Regardless, plaintiff has the burden of establishing the asserted error resulted in actual  
 5 harm. See *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (“The burden is on the party  
 6 claiming error to demonstrate not only the error, but also that it affected his “substantial rights,”  
 7 which is to say, not merely his procedural rights.”) (citing *Shinseki v. Sanders*, 556 U.S. 396,  
 8 407-09 (2009)). The ALJ found plaintiff to have other severe mental impairments at step two  
 9 and found plaintiff to have multiple nonexertional limitations in the residual functional capacity  
 10 finding. The plaintiff failed to show that the alleged error would change the ultimate disability  
 11 determination or affect plaintiff’s substantial rights. Thus, the alleged error would be harmless.  
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13        In his Opening Brief, plaintiff also briefly argues the ALJ erred by failing to find  
 14 plaintiff’s digestive impairment to be severe at step two. Dkt. #12, p. 11. Plaintiff pointed to a  
 15 note in the record about plaintiff’s subjective complaints of abdominal pain as well as plaintiff’s  
 16 mother’s testimony regarding the pain being “life disrupting.” Id. As discussed above, plaintiff  
 17 points to symptoms rather than a medically determinable impairment, which is insufficient to  
 18 show a severe impairment at step two. See SSR 96-4p, 1996 WL 374187 \*1. Further, plaintiff  
 19 again failed to show that this impairment would result in a violation of plaintiff’s substantial  
 20 rights, thus any error would be harmless. See *Ludwig*, 681 F.3d at 1054. The ALJ did not  
 21 commit error in evaluating plaintiff’s step two impairments.  
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23        II.      The ALJ’s Step Three Determination

24        At step three of the sequential disability evaluation process, the ALJ must evaluate the  
 25 claimant’s impairments to see if they meet or medically equal any of the impairments listed in 20  
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1 C.F. R. Part 404, Subpart P, Appendix 1 (the “Listings”). See 20 C.F.R § 416.920(d); Tackett v.  
 2 Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). If any of the claimant’s impairments meet or  
 3 medically equal a listed impairment, he or she is deemed disabled. Id. The burden of proof is on  
 4 the claimant to establish he or she meets or equals any of the impairments in the Listings. See  
 5 Tacket, 180 F.3d at 1098. “A generalized assertion of functional problems,” however, “is not  
 6 enough to establish disability at step three.” Id. at 1100 (citing 20 C.F.R. § 404.1526).  
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8       The ALJ found plaintiff did not meet or equal any listings at step three. AR 20. In  
 9 evaluating whether plaintiff met or equaled any of the mental disorder listings the ALJ evaluated  
 10 plaintiff’s level of restriction in his activities of daily living, social functioning, and  
 11 concentration, persistence, and pace as well as the existence of any episodes of decompensation.  
 12 AR 20-21. The ALJ found plaintiff to have mild restriction in his activities of daily living,  
 13 moderate restriction in his social functioning and concentration, persistence, and pace, and found  
 14 the record showed no episodes of decompensation. AR 21. Based on this assessment, the ALJ  
 15 found plaintiff did not meet or equal any of the mental disorder listings. AR 20-21. Plaintiff  
 16 argues the ALJ erred in his step three determination and that plaintiff should have been found to  
 17 meet listings 12.04 and 12.06. Dkt. #12, pp. 6-10. This Court disagrees.  
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19       Plaintiff argues that the evidence of record supports more severe limitations in plaintiff’s  
 20 activities of daily living, social function, and concentration, persistence, and pace. Dkt. #12, pp.  
 21 6-10. However, plaintiff’s argument amounts to a request for the Court to reweigh the evidence  
 22 in the record. It is not the job of the court to reweigh the evidence. If the evidence “is susceptible  
 23 to more than one rational interpretation,” including one that supports the decision of the  
 24 Commissioner, the Commissioner’s conclusion “must be upheld.” Thomas v. Barnhart, 278 F.3d  
 25 947, 954 (9th Cir. 2002) (citing Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d. 595, 599, 601

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1 (9<sup>th</sup> Cir. 1999)). Further, much of the evidence cited by plaintiff to support his argument is based  
 2 on plaintiff's testimony, which the ALJ found incredible, a finding the plaintiff failed to  
 3 challenge.

4       Here, the ALJ's findings at step three were supported by substantial evidence. The ALJ  
 5 noted that plaintiff was able to perform household chores and spend time with his neighbors. AR  
 6 21. He also noted plaintiff was found to have good concentration when tested by Dr. Chalstrom.  
 7 Id. While plaintiff may disagree with the ALJ's evaluation of the evidence, the ALJ's  
 8 interpretation of the evidence was equally rational and must be upheld. See Thomas, 278 F.3d at  
 9 954. The ALJ did not err in his step three determination.

10      III.     The ALJ's Assessment of Plaintiff's Residual Functional Capacity

11       If a disability determination "cannot be made on the basis of medical factors alone at step  
 12 three of the evaluation process," the ALJ must identify the claimant's "functional limitations and  
 13 restrictions" and assess his or her "remaining capacities for work-related activities." Social  
 14 Security Ruling ("SSR") [SSR] 96-8p, 1996 WL 374184 \*2. A claimant's residual functional  
 15 capacity ("RFC") assessment is used at step four to determine whether he or she can do his or her  
 16 past relevant work, and at step five to determine whether he or she can do other work. See id. It  
 17 thus is what the claimant "can still do despite his or her limitations." Id.

18       A claimant's residual functional capacity is the maximum amount of work the claimant is  
 19 able to perform based on all of the relevant evidence in the record. See id. However, an inability  
 20 to work must result from the claimant's "physical or mental impairment(s)." Id. Thus, the ALJ  
 21 must consider only those limitations and restrictions "attributable to medically determinable  
 22 impairments." Id. In assessing a claimant's RFC, the ALJ also is required to discuss why the  
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1 claimant's "symptom-related functional limitations and restrictions can or cannot reasonably be  
2 accepted as consistent with the medical or other evidence." Id. at \*7.

3 Plaintiff argues the ALJ erred in his RFC finding by not including all of plaintiff's  
4 functional limitations. See Dkt. #12, pp. 10-12. However, plaintiff fails to explain what  
5 additional limitations should have been included in the ALJ's RFC finding. Plaintiff's argument  
6 appears to be based on an assumption that the ALJ committed error in evaluating the evidence of  
7 record. Dkt. #12, p. 11. As stated previously, plaintiff did not raise issue with the ALJ's  
8 assessment of plaintiff's credibility and plaintiff failed to show that the ALJ committed any error  
9 in evaluating the medical evidence. As such, plaintiff has failed to show that the ALJ erred in his  
10 RFC finding and has failed to explain how the alleged error would result in harm. See Ludwig,  
11 681 F.3d at 1054.

12 IV. The ALJ's Findings at Step Five

13 If a claimant cannot perform his or her past relevant work, at step five of the disability  
14 evaluation process the ALJ must show there are a significant number of jobs in the national  
15 economy the claimant is able to do. See Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520(d),  
16 (e), § 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert or by  
17 reference to defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at  
18 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

19 An ALJ's findings will be upheld if the weight of the medical evidence supports the  
20 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);  
21 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony  
22 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See  
23 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the  
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1 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.  
2 (citations omitted). The ALJ, however, may omit from that description those limitations he or  
3 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

4 At the hearing, the ALJ posed a hypothetical question to the vocational expert containing  
5 substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual  
6 functional capacity. See AR 21-22, 55-56. In response to that question, the vocational expert  
7 testified that an individual with those limitations – and with the same age, education and work  
8 experience as plaintiff – would be able to perform other jobs. See AR 56-58. Based on the  
9 testimony of the vocational expert, the ALJ found plaintiff would be capable of performing other  
10 jobs existing in significant numbers in the national economy. See AR 26-27.

12 Plaintiff argues the ALJ erred by not accepting the vocational expert ("VE") testimony  
13 that missing six to eight hours of work per week would make a person unemployable. Dkt. #12,  
14 p. 12. The VE did testify that this level of absenteeism would prevent all competitive  
15 employment. AR 59. However, the ALJ did not find that limitation to be supported by the  
16 medical evidence of record and did not include that limitation into his RFC finding. AR 21-22.  
17 As stated previously, the ALJ did not err in his RFC finding. Once again, plaintiff is disagreeing  
18 with the ALJ's interpretation of the evidence without showing that the ALJ committed any legal  
19 error or that the ALJ's findings failed to be supported by substantial evidence. The ALJ did not  
20 err in his step five findings or in relying on the vocational expert testimony.  
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22 CONCLUSION

24 Based on the foregoing discussion, the Court hereby finds the ALJ properly concluded  
25 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is AFFIRMED.  
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5 DATED this 8th day of September, 2014.  
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Karen L. Strombom

Karen L. Strombom  
United States Magistrate Judge